(27)

Office - Supreme Court, U. S.
FILED
MAY 21 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 986

SOMA PETO,

Petitioner,

vs.

THOMAS HOWELL,

Respondent.

REPLY BRIEF FOR PETITIONER.

J. ROBERT COHLER,
10 S. La Salle Street,
Chicago, Illinois,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

PAGE

Citations i

Argument 2

Conclusion 10

Table of Authorities Cited.

Board of Trade v. Christie, 198 U. S. 236.....4, 5, 9

Browne v. Thorn, 260 U. S. 137..... 5

Chicago Board of Trade v. Olsen, 262 U. S. 1..... 4

Cleage v. Laidley, 149 Fed. 346..... 5

Dixon v. Uhlmann Grain Co., 288 U. S. 188..... 10

Ehrlich v. Rothschild, 292 Ill. App. 511; 11 N. E. (2d) 623.....6, 9, 10

Gettys v. Newburger, 272 Fed. 209..... 5

Hoyt v. Wickham, 25 Fed. (2d) 777, 779..... 5

Lyons Milling Co. v. Goffe & Carkener, 46 Fed. (2d) 241..... 5

Mullinix v. Hubbard, 6 Fed. (2d) 109..... 5

Peto v. Howell, 117 Fed. (2d) 249..... 8

Ponder v. Jerome Hill Cotton Co., 100 Fed. 373..... 5

Riordon v. McCabe, 341 Ill. 506; 173 N. E. 660.....
.....3, 4, 5, 6, 10

Roundtree v. Smith, 108 U. S. 269.....10, 11

Salzman v. Boeing, 304 Ill. App. 405..... 4

Statutes Cited.

Commodities Exchange Act, Title 7, Sec. 2, U. S. C. A. 4

Illinois Revised Statutes 1939, Chap. 38, Sec. 320.... 7

MISCELLANEOUS.

Baer & Woodruff "Commodity Exchanges" (Third Edition, 1929, 1935..... 4

H. C. Emery "Speculation on the Stock and Produce Exchanges of the United States" (1896), 100-101.. 4

Hedging in Grain Futures, Official Bulletin No. 151 U. S. Department of Agriculture, Page 15..... 7

Legal Status of Trading in Futures by H. S. Irwin, 32 Ill. Law Review 155.....3, 4, 6

Senate Report No. 871, 67th Congress, Second Session, Page 3..... 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 986

SOMA PETO,

Petitioner,

vs.

THOMAS HOWELL,

Respondent.

REPLY BRIEF FOR PETITIONER.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

In reply to the brief of the respondent, we respectfully present the following:

ARGUMENT.

I.

Respondent states the question involved is one of fact and the jury on the last trial, having found for him, the matter is concluded. In the opening paragraph of his brief, he states:

> "The only question presented by the Petition for Certiorari is whether the record contains sufficient evidence of the illegality of particular trades of petitioner in the grain futures market to have warranted the trial court in submitting the question to a jury."

Petitioner submits that this is not a question of fact but quite to the contrary, a question of law.

Reply to Point II.

The theme of respondent's brief is the same as presented by him in his brief filed in the Circuit Court of Appeals, namely, that petitioner did not make physical delivery of corn on his sale of 35,000 bushels of Chicago July 1931 corn "futures" and hence the transaction is illegal. What neither respondent nor the Circuit Court of Appeals commented upon in its opinion is the fact that by his illegal monopoly of the July 1931 corn market on the Chicago Board of Trade, respondent made it physically impossible for any short seller including petitioner to make physical delivery.

It is not disputed that in violation of the Sherman Anti-Trust Act, through the means of "dummy" accounts, through falsification of reports to the Grain Futures Administration, respondent was able to corner the corn market by acquiring 7,440,957 bushels of Chicago July corn

constituting 97 per cent of the total commercial visible supply in Chicago. (Ex. 100, Rec. 51; Ex. 80, Rec. 130.)

Petitioner testified, and it is not contradicted, that during the last three days of July, 1931, when the respondent artificially enhanced the price of corn 24½¢ a bushel, petitioner could not even buy 35,000 bushels of corn in the largest grain market in the world to make delivery. (Rec. 80.)

It would seem a perversion of justice to sustain respondent's contention that petitioner was gambling, as evidenced by the fact that no physical delivery took place, when respondent, by his own illegal act, made physical delivery impossible.

Reply to Remainder of Point II.

Under Point II, respondent argues *that an offsetting trade constitutes a settlement in differences.** He cites some fifteen cases which he claims are in support of such contention. The first case, namely, *Riordon* v. *McCabe*, 341 Ill. 506; 173 N. E. 660, holds exactly to the contrary and is relied upon by petitioner. Of the remaining fourteen cases, all but two were decided before the enactment of the Grain Futures Act (now known as the Commodities Exchange Act) and the supervision of Exchanges by the Grain Futures Administration. Some of the cases were decided around the turn of the century when even a committee of the Illinois legislature and many courts considered the Chicago Board of Trade an economic evil and in the same light as a "bucket shop." See "Legal Status of Trading in Futures," 32 Ill. Law Review, 155.

In practically every case cited by respondent, the facts themselves distinguish the cases from the instant one, and the persons seeking to hold the transactions gambling,

* All italics ours unless otherwise indicated.

such as retired farmers, physicians, bank cashiers and others, were not even remotely connected with the grain trade. In the same manner *Salzman* v. *Boeing,* 304 Ill. App. 405 is distinguished on its facts and also because the point of law out of which the appeal arose is not the same as in the instant case.

That a futures trading market performs many necessary economic functions can no longer be disputed. See "Legal Status of Trading in Futures," 32 Ill. Law Review 155 by H. S. Irwin. Even Congress has recognized that commodity transactions known as "futures" are affected by a national public interest. See "Commodities Exchange Act, Title 7, Section 2, U. S. C. A.

Commodity future trading is not only of great economic value but legitimate speculation is indispensible to the proper functioning of the futures market. See Senate Report No. 871, 67th Congress, Second Session, Page 3; *Riordon* v. *McCabe,* 341 Ill. 506, 514; *Board of Trade* v. *Christie,* 198 U. S. 236, 249. See also Baer & Woodruff Commodity Exchanges (Third Edition) 1929, 1935, at pages 125 and 126; H. C. Emery "Speculation on the Stock and Produce Exchanges of the United States" (1896), pages 100-101.

It is a fact that of the billions of bushels of futures dealt in annually on the Chicago Board of Trade, less than 2 per cent are settled by delivery. In *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, upholding the constitutionality of the Grain Futures Act, the late Chief Justice Taft notes than less than 1 per cent of all contracts made on the Chicago Board of Trade are settled by delivery.

Respondent would have this Court believe that setoff constitutes a settlement on differences in violation of the Illinois Statute and thus it would follow that the Commodity Exchange Administration is merely supervising a big gambling organization on which 98 per cent of all

transactions are illegal because they are settled by offset and not by physical delivery.

Since they are directly in point, respondent for obvious reasons makes no attempt whatsoever to explain or distinguish the cases cited by petitioner. The leading case, *Board of Trade* v. *Christie*, 198 U. S. 236, which holds at page 248 that "setoff has all the legal effects of delivery," while referring to dealings between members on the exchange was soon applied by the courts to include dealings between customer and broker. See *Riordon* v. *McCabe*, 341 Ill. 506; *Cleage* v. *Laidley*, 149 Fed. 346; *Gettys* v. *Newburger*, 272 Fed. 209; *Mullinix* v. *Hubbard*, 6 Fed. (2d) 109; *Browne* v. *Thorn*, 260 U. S. 137; *Hoyt* v. *Wickham*, 25 Fed. (2d) 777, 779; *Ponder* v. *Jerome Hill Cotton Co.*, 100 Fed. 373, *Lyons Milling Co.* v. *Goffe & Carkener*, 46 Fed. (2d) 241.

Petitioner states that respondent's statement that the leading Illinois case, *Riordon* v. *McCabe*, 341 Ill. 506, 173 N. E. 660 holds that trades settled by setoff are illegal and void is a misstatement of fact which can be ascertained by a mere reading of that decision.

As set forth in the appendix in petitioner's Brief in support of Petition, McCabe was a farmer whose trades on the Chicago Board of Trade during 1919, 1920 and 1921 were highly speculative. Up to March of 1921, he bought and sold in excess of 25,000,000 bushels of grain at a total price in excess of $29,000,000.

Each and every transaction was closed out by an offset and he did not take or make delivery on a single bushel of grain bought or sold by him.

The Supreme Court of Illinois said, 341 Ill. 506, at 509:

> "We are of the opinion that as to the period prior to March 1, 1921, the evidence does not disclose an intention on the part of the plaintiffs in error contrary to the statute * * *."

It was only after McCabe had sunk into deep financial difficulties, evidenced by large overdrafts with his brokers, the mortgages which the brokers took on his farm and the forced liquidation of his holdings, all of which his brokers knew, that the court held the transactions made *subsequent* to that time were illegal.

Petitioner contends that the decision of the Circuit Court of Appeals in the instant case is directly contrary to the Illinois law as set forth in *Riordon* v. *McCabe,* 341 Ill. 506; 173 N. E. 660, and *Ehrlich* v. *Rothschild,* 292 Ill. App. 511; 11 N. E. (2d) 623; and contrary to the law of the other Federal Circuits.

Answer to Respondent's Contention That B. C. Christopher & Company Intended to Gamble.

Respondent states in Point 2-D (pp. 10-14) of his brief that the evidence which indicated an intent on the part of B. C. Christopher & Company to gamble is:

1. The ledger sheets show settlement by offset.

2. The P and S slips show an intent to settle on differences.

3. B. C. Christopher & Company refers to its futures ledger and the futures department as the "option ledger" and the "option department."

This is the same argument made by respondent in the Circuit Court of Appeals and is the only evidence which the Circuit Court of Appeals commented upon as inferring an illegal intent on the part of B. C. Christopher & Company to gamble.

The ledger sheets of B. C. Christopher & Company do show trades closed out by offsets. However, in excess of 98 per cent of all trades on the Chicago Board of Trade will show the same. This does not constitute the slightest evidence of an intent to gamble. See "Legal Status of Trading in Futures", 32 Ill. Law Review 155 by H. S.

Irwin and the cases cited directly on this very point in petitioner's Brief in support of Petition on pages 20-23. See also testimony of respondents own auditor (Rec. 180-181) and "Hedging in Grain Futures", Official Bulletin No. 151 U. S. Department of Agriculture (page 15 thereof) both of which are referred to on pages 33-35 of petitioner's brief.

The statement that the "P" and "S" slips indicate an intention to gamble has already been answered in petitioner's brief. (Pages 32-33.)

With respect to respondent's argument that the fact that B. C. Christopher & Company refers to its "futures" ledger as the "option ledger" and its "futures" department as its "option department" and hence this is evidence of an intent to gamble. We wish merely to state here that options are not declared illegal under the Illinois Act. The only options or contracts declared illegal are those where at the time of the making of such contract or option, it is the intention of both parties to the contract or option that the same be settled only by the payment of money differences. See Ill. Revised Statutes 1939, Chap. 38, Sec. 320. Respondents contention about "options" has been fully answered in petitioner's brief on pages 35-36.

Answer to Respondent's Contention as to Petitioner's Financial Ability.

The conclusion respondent arrives at, and which is apparently adopted by the Circuit Court of Appeals, that petitioner's obligations exceeded $90,000.00 defies explanation. (Respondent's brief, page 13.)

Respondent makes this statement to indicate that petitioner who testified he was worth about $45,000.00 was unable to carry his trades.

That petitioner did not default when respondent applied

. 583

2 of 2

the "squeeze" but promptly paid the amount dictated by respondent means nothing to him.

Respondent arrives at this remarkable conclusion by stating that petitioner sold 50,000 bushels of corn at a price of $31,006.25; 50,000 bushels of wheat (short) at a price of $29,831.25; and that petitioner bought (long) 50,000 bushels of wheat at a price of $31,581.25—and by simply adding all figures together, debits as well as credits, the total of $90,000.00 is reached.

The Circuit Court of Appeals (on what basis petitioner can still not understand) seemingly adopted respondent's arithmetical calculations and without citing figures, however, stated flatly:

> "To have effectuated actual delivery would have required many thousands of dollars." *Peto* v. *Howell*, 117 Fed. (2d) 249, 252.

In respect to the 50,000 bushels of corn sold short by petitioner the record discloses that he was, in fact, short only 35,000 bushels, having previously closed out 15,000 bushels (Rec. 76, 81; Ex. 149, 153; Rec. 82-84) and that at the same time petitioner bought 35,000 bushels of Chicago September corn so that his position as a whole in the market was even. (Rec. 81.)

In regard to the wheat, petitioner was short 50,000 bushels for which he was to receive $29,831.25 and long 50,000 bushels for which he was to pay $31,581.25. His total debit obligation on the wheat was $1,750.00, and not the sum of $61,412.50, arrived at by adding the debit and credit together, as respondent would have this court believe.

The evidence shows that respondent traced all of petitioner's sales and purchases from November 20, 1930 through July 31, 1931 and that excepting for a few days, petitioner was as many bushels "long" as "short" and for those few days he was never "long" or "short" more than 10,000 bushels. (Rec. 181.) This is all graphically

shown on respondent's Exhibit 2 of February 5, 1940. (Rec. 173.)

At no time during this entire period, if petitioner is given credit for the sale price he was to receive, instead of adding it onto the purchase price he was to pay, did his obligations exceed a few thousand dollars.

III.

Petitioner's Cases as Distinguished by Respondent.

Under Point III respondent starts to distinguish cases cited by petitioner but stops with *Board of Trade* v. *Christie,* 198 U. S. 246. Because he cannot, respondent makes no attempt to distinguish the many cases cited in petitioner's brief or the law as set forth in the "Restatement of Contracts" and the example given by the authors of the Restatement, cited on page 17 of petitioner's brief.

Ehrlich v. *Rothschild,* 292 Ill. App. 511, 11 N. E. (2d) 623, relied upon by petitioner (together with *Riordon* v. *McCabe*), is disposed of by respondent on page 14 of his brief by a statement that the transactions there involved amounted to $13,210.00, whereas the trader was worth at least $50,000.00. *This, again, is a misstatement of fact which a reading of said case will readily disclose.* The transactions out of which the litigation arose in that case involve more than $13,210.00. Defendant obtained this figure by selecting one excerpt from the Ehrlich case, on page 625, where the Court said:

> "Exhibit 4 is a statement on the stationery of the defendants showing this transaction (200 shares of U. S. Steel) to the extent of $13,210.00."

The evidence in the Ehrlich case showed that after this purchase, the price of U. S. Steel declined and the broker urged Ehrlich to recoup his losses by buying wheat futures.

The total purchases of Ehrlich amounted to $83,210.00 (pp. 626-27), a slight difference between such amount and $13,210.00.

Respondent relies on *Dixon* v. *Uhlmann Grain Co.*, reported in 288 U. S. 188 and decided by a divided court. (Justice Stone and the late Justices Butler and Cardoza dissenting.) However, that case is distinguished in the words of the majority opinion when the Court said at page 195:

> "* * * Of the five defendants in the cases consolidated for trial, who were the plaintiff's largest customers at Carrolton, two were farmers, two were clothing merchants, and one was an ice dealer. *These defendants, who were not in the grain business, who had never traded on a grain exchange,* and who had no facilities for handling grain, purported to buy and sell in amounts up to 50,000 bushels in a single transaction, * * *"

Conclusion.

There is no evidence in the record that shows an intention on the part of petitioner and B. C. Christopher & Company to settle on differences only, and that such intention was mutual and disclosed.

The Circuit Court of Appeals decided the instant case directly contrary to the Illinois law as set forth in *Riordon* v. *McCabe*, 341 Ill. 506, 173 N. E. 660; *Ehrlich* v. *Rothschild*, 292 Ill. App. 511, 11 N. E. (2d) 623, and the other Federal cases cited.

So far as petitioner knows, this decision of the Circuit Court of Appeals is the only one on record holding transactions between two members of Boards of Trade, both devoting all of their time to the grain trade, both dealing in actual grain, are gambling when the only one so contending is a third party (respondent) (see *Roundtree* v.

Smith, 108 U. S. 269) to escape the consequences of his own illegal monopoly.

It is therefore respectfully urged that the judgment of the Circuit Court of Appeals be reversed and to that end a writ of certiorari should be granted.

J. ROBERT COHLER,
Attorney for Petitioner.